No. 7239

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 10

NEW YORK-ALASKA GOLD DREDGING COMPANY (a corporation),

Appellant,

vs.

LESTER B. WALBRIDGE,

Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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The appellant will hereinafter be referred to as the Company, and the appellee as Walbridge.

This case was before this Court in the year 1930 as No. 5796 on an appeal from a directed verdict and was reversed by this Court. (38 Fed. (2nd) 199.)

It was retried on the same pleadings and a verdict and judgment were rendered against the Company, from which this appeal is taken.

STATEMENT OF FACTS.

This was an action brought by Walbridge against the Company to recover a balance alleged to be due him for salary as superintendent and manager of the

property and business of the Company in Alaska from April 1, 1922 to January 5, 1928.

The undisputed testimony was that Walbridge, a resident of Brooklyn, made a trip to Alaska in 1921 to investigate some properties for a small New York syndicate; that he acquired by location some properties on the Tuluksak River. (R. p. 77.) In the fall of 1921 he and his associates caused the appellant Company to be organized to handle the grant that he had staked. He was an incorporator of the Company, a director and vice-president from its organization until January, 1926.

March 21, 1922, the board of directors of the Company (Walbridge being a member thereof and vice-president at that time) adopted a resolution, in words and figures as follows, being plaintiff's Exhibit 1 (R. pp. 78 and 120):

> "Upon motion duly made and seconded, it was ordered to pay Lester B. Walbridge, as General Manager, a salary of $7200 per year, said salary to be paid in installments of $600.00 per month or in such other installments as the Directors may determine, said salary to accrue from April 1st, 1922, and to continue until cancelled by action of the Board of Directors."

The Company had no property other than the above-mentioned placer claims on the Tuluksak River. Walbridge knew nothing about mining, so Ralph Hirsh, a mining engineer, went to Alaska with him, taking drills and supplies. (R. p. 79.) Walbridge and Hirsh returned to New York in March, 1923. His salary for the eleven months during his absence, $6600, was

paid to his wife. The Company was then without funds and it had bills payable and no money in the treasury. (R. p. 92.) April 13, 1923, at a meeting of the board of directors, in New York, Walbridge was present as a director and vice-president. Ways and means were discussed. Milton S. Dillon, director, secretary and treasurer of the Company, agreed to purchase treasury stock to the extent of $16,600. Hirsh said he needed $15,000 with which to do the drilling, so that, with the traveling expenses, there was barely enough money to send Hirsh to Alaska. Since there was nothing in the way of management to be undertaken, but merely engineering in the way of drilling in Alaska, it was agreed by the entire board of directors, including Walbridge, that it was unnecessary for him to go to Alaska. (R. p. 92.) He agreed that this was the best plan. No entry of this agreement was made on the minutes of the board. (R. p. 92.) However, the agreement was proved by the testimony of other directors. (R. p. 105.)

Walbridge admitted that he did not go to Alaska for the period from March 1, 1923 to March 1, 1924 (R. p. 79), but claimed that he remained in New York and devoted his time and efforts to raising funds for the corporation. But he would not say that, aside from the purchase of stock for $16,600 by Dillon, any stock had been sold during the year. (R. p. 80.)

The Company's testimony was that Walbridge did not perform any services at all for it during that period, that he was not paid anything, and that he made no demand for payment during the period March 1, 1923 to March 1, 1924. (R. pp. 93 and 105.)

February 6, 1924, another meeting of the board of directors was held in New York City, Walbridge being present. He stated that he would like to be sent to Alaska. The condition of the Company's finances was discussed, and it was pointed out that the finances did not permit the payment of any salary or expenses. He stated to the board that his stock interest was one of the largest and it was imperative for him to go to protect his own interests and he would go at his own expense, without salary, and this was agreed to by the board. (R. p. 92.) At this meeting there were present Grubb, president; Walbridge, vice-president; Dillon, secretary-treasurer; McQuoid, director; Smith, director; and Fowler, director. (R. p. 106.)

Pursuant to the agreement, Walbridge went to Alaska for three or four months in the year 1924, returning in the fall. He neither requested nor was paid any salary for the period March 1, 1924 to March 1, 1925. Certain money was loaned to him as an advance by the Company for his insurance and family expenses, totalling $531.54 during this period. (R. p. 93.)

In the winter of 1924, Walbridge told Dillon (R. p. 93) and likewise told Fowler (R. p. 106), that he was no longer able to give his services to the Company gratis, and that thereafter if he went to Alaska he must have a salary. He asked for $300 per month. (R. pp. 93, 106.) Nothing was done about it, however, until the board meeting in January, 1925. (R. pp. 94, 106.) It was then determined that he was to have a salary of $300 a month payable to his wife and $300 a month to be held contingent on the Com-

pany's becoming self-supporting and paying dividends. (R. pp. 94, 106.)

April 13, 1925, just before leaving for Alaska, Walbridge gave Dillon a letter authorizing payment of the $300 per month to Walbridge's wife and asked Dillon to sign another letter (Pltf.'s Ex. No. 2, R. p. 81) stating that the balance of $300 was to accrue to Walbridge's credit on the books of the Company. (R. p. 81.) Dillon said he would sign it if Walbridge likewise signed a letter he, Dillon, would prepare (Deft.'s Ex. for Identification "A," R. p. 96), which stated that the remaining $300 would be paid only if the Company was on a sound financial basis and paying dividends. (R. p. 96.) Walbridge signed this letter and the original was placed in a filing cabinet in Dillon's office, to which cabinet Walbridge had access. A carbon copy of the letter was placed in another file. The original disappeared and the carbon copy was produced at the trial. (R. p. 96.) The refusal of the Court to admit this letter in evidence is the basis of one of the assignments of error. (R. p. 148.)

Walbridge remained in Alaska from April, 1925, until the spring of 1927. (R. p. 81.) After being in New York for a month or two he returned to Alaska and remained there until November, 1927, when he returned to New York. (R. p. 81.)

In April, 1926, while in Alaska and at the Company's office, Walbridge stated in the presence of witnesses that he was on a contingent salary of $300 a month, providing the Company came through and was on a paying basis. (R. p. 111.) When he returned to New York in 1927, he again stated in the presence

of witnesses that he was to receive a salary of $600 a month, that $300 a month had been paid and the remaining $300 a month was to be paid when the Company was on a paying basis. (R. p. 112.) The refusal of the Court to permit this testimony is the basis of two of the assignments of error. (R. p. 173.)

Subsequent to this time, and in the summer of 1927, a budget for the year's operation was prepared by Dawson, a consulting mining engineer, and Walbridge stated to him that the combined salaries of himself and Hirsh for the year were $7200. (R. p. 113.) The refusal of the Court to permit this testimony is the basis of an assignment of error. (R. p. 177.)

Again, in July, 1927, Walbridge stated to the bookkeeper of the Company, Crowdy, in Alaska, that he was to receive $300 cash per month and an additional $300 per month to be paid when and if the Company became on a self-supporting and dividend-paying basis. (R. pp. 117, 119.) Refusal of the Court to permit this testimony is assigned as error. (R. pp. 177, 180.)

The undisputed testimony is that the Company has never paid any dividends and at no time has it been on a self-supporting basis. (R. pp. 115-116.)

No issue in this case arises from the condition of the pleadings. We will, therefore, content ourselves here with merely a cursory statement concerning them. The complaint is in four counts. (R. p. 3.) In the first three it asks for the return of certain sums of money advanced by Walbridge; and in the fourth for damages for breach of the contract of employment. In its second amended answer (R. p. 34) the Company

admits that it owes the matters set forth in said first, second and third causes of action of the complaint. By way of abatement it is pleaded that Walbridge entered the employment of the Company on March 21, 1922, at a salary of $600 per month and that he was paid in full at that rate until March 1, 1923; alleges that during the year 1924, Walbridge performed services free of charge; alleges that from April 1, 1925, to January 1, 1928, services were rendered under an agreement providing for $300 per month and an additional $300 when the Company became self-supporting and that under this modification the Company paid Walbridge $300 per month in full. By way of counterclaim the Company alleges that Walbridge has certain sums of money as a result thereof and over and above all setoff Walbridge is indebted to the Company in the sum of $3463.32. An amended reply (R. p. 43) to the second amended answer denies the allegations of said answer.

ASSIGNMENT OF ERRORS.

We respectfully submit that the trial court erred in the following particulars:

ADMISSIONS AND EXCLUSIONS OF TESTIMONY.

(1)

The error upon which we first rely is the exclusion by the trial court of the letter of March 21, 1925 (Defendant's Exhibit A, R. p. 96), from Walbridge to the Company, which is as follows:

"New York-Alaska Gold Dredging Co.
New York, N. Y.
March 21, 1925.

Milton S. Dillon, Treasurer,
120 Broadway,
New York City.

Dear Sir:

With the purpose of clarifying the situation with respect to my salary, I hereby state that my salary was determined by the Board of Directors at a duly held meeting on March 21, 1922, to be the sum of $7200 per year payable in installments of $600.00 per month. It was, however, understood that I should be entitled to only $3600 per year payable in installments of $300.00 per month until such time as the company was on a sound financial basis and paying dividends. All of which was agreed to by me.

Yours very truly,
(Signed) Lester B. Walbridge."

The exclusion of this letter is the subject of Assignment of Errors III. (R. p. 148.) The letter was an admission in writing by Walbridge that the original resolution of employment had been, by that time at least, qualified in many important essentials.

The reasons set forth by the attorney for Walbridge in his successful objection to the admission of this testimony are various. They are to the effect that the resolution of the board of directors of March 21, 1922, needed no clarification (R. p. 97); that the letter attempts to vary the terms of that original agreement and that the Company, having proceeded under the original "agreement" for some time, could not now

claim that it was now terminated and modified in various ways by the new letter; that the Company could not now assert that a new agreement had been made. The general purport of the objection was to attempt to give to the original resolution the status of a contract. That is something which a resolution does not possess as a matter of law. The attitude of the trial court was further exemplified by its rulings in connection with kindred testimony. An example of the latter is found in the testimony of Oswald Fowler. (Assignment of Errors XXXIII, R. p. 171.)

Our position is that the resolution of a board of directors is not in itself an agreement and that any change in the relationship established by such a resolution may be brought about without formal or any meeting of the board, merely by action of an officer or officers. This was the opinion of this Court when this case was heard before. Under these circumstances the exclusion of the testimony of Milton S. Dillon, the secretary and treasurer of the Company, and the officer who was in active charge of its affairs, to the effect that informal meetings were held and it was very unusual to enter the proceedings on the minutes, was highly prejudicial error. The Company's offer of proof in this connection is the subject of our Assignment of Errors XXVI and XXVII. (R. p. 167.)

The error in the exclusion of that letter was made more damaging to the Company by the admission, over its objection, of the letter dated April 11, 1924, from Dillon to Mrs. Walbridge. (R. p. 83.) This was ad-

mitted for the purpose of explaining the terms of the original resolution of the board of directors of March 21, 1922. This letter to Mrs. Walbridge is the subject of Assignment of Errors I, II, IX, X and XI. (R. pp. 146, 147 and 159.)

This error was likewise the more flagrant and prejudicial because the letter which the Court excluded (from Walbridge to the Company, Defendant's Exhibit Identification "A," R. pp. 95-96) was written and delivered by him to Dillon, secretary and treasurer of the Company, as the inducement for Dillon's letter to Walbridge (Plaintiff's Exhibit 2, R. p. 81) on which the plaintiff relies to substantiate his claim of a new contract. The two letters were a part of the same transaction (R. pp. 95-96) yet the Court admitted one (R. p. 81) and excluded the other. (R. pp. 96 and 98.)

(2)

Another important exclusion was plaintiff's testimony on cross-examination with regard to whether or not he had ever stated that he, because of his interest in the Company as an organizer, incorporator, officer and heavy stockholder, would go to Alaska during the year 1924 and work without compensation, the Company being in financial straits. An objection to the question was sustained. (R. p. 85.) (Assignment of Error XII, R. p. 159.)

(3)

The trial court erred in excluding all evidence with regard to either financial statements or budgets. Esti-

mates and budgets were prepared by Walbridge from time to time in connection with the business in Alaska. It was necessary to show the amount of compensation being paid to the various employees, including Walbridge. They were, therefore, the best evidence of his own conception of what he should receive. (Assignment of Errors IV, V, VI, VII and VIII, R. pp. 149-158.) Along the same lines were various statements made by him when discussing, with accountants, bookkeepers and Company officials, estimates and expenses. On cross-examination Walbridge was asked concerning the statement he had made at the meeting in the Company's office where, with accountants and officials, the question of the budget for the year's running of the dredge and overhead was brought up. Walbridge was not permitted to answer. (Assignment of Errors XVI, XVII and XVIII, R. pp. 162 and 163.) The attempt by Milton S. Dillon, the secretary and treasurer of the Company, to testify concerning such matters was stricken out. (Assignment of Errors XXIV and XXV, R. p. 161.) The testimony of Arthur B. Dorer, the accountant, suffered a like fate. (Assignment of Errors XXVIII and XXIX, R. p. 168.) Oswald Fowler attempted to corroborate these conversations in various ways. His testimony was rejected. (Assignment of Errors XXX, XXXI and XXXII, R. pp. 169 and 170.) The witness E. H. Dawson, the consulting mining engineer, gave much more comprehensive evidence concerning these financial statements than any other witness. All of his testimony in this connection was excluded. (Assignment of Errors XXXVII and XXXVIII, R. pp. 174

and 175.) James K. Crowdy, the bookkeeper, suffered the same fate. (Assignment of Errors XLIII, XLIV, XLV, XLVI, XLVII, XLVIII, XLIX, L, LI, LII, LIII and LIV, R. pp. 177 to 180.)

(4)

On April 13, 1925, the Company gave Walbridge a letter as follows (R. p. 81):

"New York-Alaska Gold Dredging Co.
New York, N. Y.
April 13th, 1925.

Lester B. Walbridge, 180 Argyle Road,
Brooklyn, N. Y.

Dear Sir:

According to our understanding, beginning May 1st, 1925, you are to receive $300 per month, which is to apply against your salary of $600 per month. The balance to accrue to your credit on the books of the company.

New York-Alaska Gold Dredging Co.,
By M. S. Dillon,
Sect'y & Treas."

No objection was made to its admission by the Company. It was given a curious interpretation by the Court. It was not signed by both parties. It was even less an agreement than the original resolution of employment of March 21, 1922. It was a letter and nothing more. However, the Court took the position that it was a document so complete and so formal that all oral conversations affecting the subject of Walbridge's compensation, where they occurred prior to its signing, *merged* in the writing; and if they occurred subsequently could not be used to contradict it. This, of

course, is error. The doctrine of merger has no bearing here. Yet, on the theory of merger and attempted contradiction of a written instrument there was excluded the testimony of Oswald Fowler (Assignment of Errors XXXIII, XXXIV and XXXV, R. pp. 171 to 173); on the contradiction of a written instrument, the testimony of Walbridge himself (Assignment of Errors XIII, XIV and XV, R. pp. 160 and 161); of Milton S. Dillon (Assignment of Errors XX, XXI, XXII and XXIII, R. pp. 163 and 164); of Oswald Fowler (Assignment of Errors XXXIV and XXXV, R. p. 173); of Robert E. Martin (Assignment of Errors XXXVI, R. p. 173), and of Ralph T. Hirsh (Assignment of Errors XXXIX and XL, R. p. 176).

This letter of April 13, 1925, was closely tied up with the letter of March 21, 1925, from Walbridge to the Company. They were really part of the same transaction and the reason why the Company did not object to the admission in evidence of the letter of April 13, 1925, was because it assumed that the letter of March 21, 1925, would be admitted. One part of an agreement cannot be considered without the other.

INSTRUCTIONS.

(1)

We feel that the trial court gave an erroneous instruction concerning the burden of proof in the following words:

> "The burden of proof will be upon defendant to show you by a preponderance of the evidence that

> the plaintiff did agree to perform said services without salary. If the defendant sustains its burden, you will not allow plaintiff any salary for the thirteen months ending April 30, 1925; but, if the defendant fails to sustain its burden, you will allow plaintiff's salary for that period."
>
> (Assignment of Errors LX, R. p. 192.)

This shifts the ordinary burden of proof to the defendant without good reason.

(2)

The trial court referring to the language of the letter of April 13, 1925, says (R. p. 195):

> "I instruct you that the words 'accrue to your credit on the books of the company' as therein used and as applied to the sum of $300.00 per month not to be paid in cash by defendant to plaintiff meant that said $300.00 per month should be entered on the defendant's books as a credit to plaintiff and should thereupon become a fixed obligation of the defendant which plaintiff had an immediate right to enforce. *However, taken in connection with the provision of the letter with regard to the payment of $300.00 per month cash, there is an included right given to the defendant to withhold until plaintiff make demand therefor* the payment of the $300.00 per month which was to accrue to the plaintiff." (Italics ours.)

This is our assignment of errors LXI A. (R. p. 196.) This interpretation forces the jury to decide that a mere letter bound the Company to pay Walbridge on demand a second $300 each month. The actual testi-

mony is to the effect that this was a mere contingent liability.

(3)

There are several errors in plaintiff's instruction No. 1. It says that the resolution of March 21, 1922, expressed and fixed the terms of employment. This resolution is not a contract and could not fix the terms of employment. (Assignment of Errors LXII A, R. p. 200.) It also gives the effect of an agreement to the letter of April 13, 1925. (Assignment of Errors LXVII, R. p. 202.) Nor is any affirmative action necessary to terminate the employment of plaintiff under the resolution of March 21, 1922. (Assignment of Errors, LXII B, R. p. 200.)

(4)

Defendant's proposed instruction No. 1 concerning the legal effect of the resolution of March 21, 1922, was excluded. The first part of that instruction states that the said resolution might be altered by any subsequent oral agreement between said plaintiff and the directors of said corporation or some of them. This is the same proposition which we have already established in that part of our brief having to do with the exclusion of testimony. There is nothing permanent about a corporate resolution. Its effect may be changed either by a new resolution or by the action of duly elected officers. This was the opinion of this Court on the first appeal. The second part of the resolution follows as a matter of course upon the first. If the provisions of the resolution were subject to

change Walbridge could make any subsequent stipulation which he desired with regard to acting without compensation. (Assignment of Errors LV, R. p. 181.)

(5)

The exclusion of defendant's proposed instruction No. 3, concerning services rendered in 1924, was error. The question of his compensation for 1924 should have been submitted to the jury. (Assignment of Errors LVII, R. p. 185.)

ARGUMENT.

I.

THE COURT ERRED IN EXCLUDING MUCH OF THE TESTIMONY OFFERED BY THE COMPANY.

The remarkable thing about this case is that, after the decision of this Court upon the first appeal, the trial court had the temerity to exclude a certain important line of testimony entirely. The ground for the decision on reversal was that a directed verdict was not permissible where there was certain evidence concerning the relationship between Walbridge and the Company, relating particularly to his rate of compensation. If this Court felt that such testimony warranted a reversal it is obvious that it must also in the present case have warranted the trial court in permitting the jury to weigh it. In the prior case this Court said:

> "There is much evidence as to the dealings of the appellee with the various officers of the appellant corporation and with the members of the

board of directors from which it might be inferred by the jury, as contended by the appellant, that from and after March 1, 1923 and until March 1, 1925, it was agreed by the appellee and the said officers that he should receive no salary at all during that period."

Virtually all of the testimony relating to the same dealings between the various officers of the corporation and Walbridge was excluded, when the facts were still identical with those which existed in the original case. Some of the evidence relied upon by this Court in the prior opinion was not excluded on the first trial but has been excluded now. The two situations are identical. What was important then is important now.

If in the one case this line of testimony was important enough to lead this Court to insist upon the jury having the right to determine its weight, it follows that it is sufficient in any other case to guarantee its admissibility at least.

Some of the testimony excluded by the Court will now be considered in detail.

1. The letter of March 21, 1925, from Walbridge to Milton S. Dillon should have been admitted in evidence.

Probably the outstanding exclusion is defendant's identification A, which was admitted in evidence at the first trial, and is a letter dated March 21, 1925, from plaintiff to Milton S. Dillon as treasurer of the Company. This letter (R. p. 96) is as follows:

"March 21, 1925.

Milton S. Dillon, Treasurer,
120 Broadway,
New York City.

Dear Sir:

With the purpose of clarifying the situation with respect to my salary, I hereby state that my salary was determined by the Board of Directors at a duly held meeting on March 21, 1922, to be the sum of $7200 per year payable in installments of $600.00 per month. It was, however, understood that I should be entitled to only $3600 per year payable in installments of $300.00 per month until such time as the company was on a sound financial basis and paying dividends. All of which was agreed to by me.

Yours very truly,
(Signed) Lester B. Walbridge."

(Assignment of Errors III, R. p. 148.)

The objection which was sustained by the trial court was to the effect that it does not seek to clarify the original resolution of employment dated March 21, 1922, which plaintiff asserts needed no clarification; and that it varies the terms of the said original agreement. The attorney for plaintiff even asserts that it could not throw light upon the contract which was *signed* and was clear in itself.

Of course, even though the said resolution of March 21, 1922, be regarded as a written instrument, it never was executed by Walbridge and certainly it was not one that could have been signed by him. A resolution does not bind a corporation unless communicated to the other party and signed by him. This is held in

a comprehensive and well considered opinion in *Alabama etc. Co. v. Adams* (Ala.), 119 So. 853. The objection, therefore, in this connection is based upon a misstatement of fact. Said resolution was not even the first formal action of the board covering Walbridge's employment. In a meeting held November 21, 1921, shortly after Walbridge had caused the Company to be incorporated, he was given the office of manager at an annual salary of $5000. (R. p. 77.)

In the second place, the objection misconstrues the legal effect of said resolution of the board. As stated by this Court in its prior opinion, there was nothing in the nature of such a resolution to prevent its subsequent modification, cancellation or rescission and such action might be done either by the formal action of the board, or by the officers and without a formal entry in the minute book. The case of *Miller & Co. v. Woolsey* (N. J.), 128 Atl. 540, cited by this Court, is to the effect that the officers of a corporation have the authority, without specific resolution, to make agreements with regard to leasehold interests. It amply supports the proposition.

Furthermore, the excluded letter did not in any respect contradict the resolution. The resolution provided that the rate of $600 per month should be paid until further action of the board. Walbridge went to Alaska during the first year, and he admits that during that period the stipulated salary was paid in full. There is also much testimony, offered by the defendant and some of it (such as pay rolls and cost estimates) erroneously excluded by the trial court, to the effect

that plaintiff agreed that during the second year he would render no services whatsoever for the defendant corporation; and that during the third he would work for it and go to Alaska without compensation because of its financial condition and because of his interest as a heavy stockholder. If this improperly excluded testimony had been admitted, it would afford ample support for the statement made in this letter of March 21, 1925, to the effect that it was written to clarify the situation with regard to his salary, by stating that it was decided that Walbridge should receive only $300 per month, and that the balance should be paid only when the corporation was on a sound and dividend paying basis. The letter, therefore, is a clear admission by Walbridge that during such times as he has not been paid in full, and during such times as he was supposed to receive any salary at all, either at the time the letter was signed or in the future, his compensation is to be $300 with an additional $300 being contingent. The Company has never been on a dividend paying basis. (R. p. 116.)

Even though the letter be regarded as flatly contradicting the terms of the original resolution, still it was admissible in evidence. A corporation may introduce parol evidence to show that a resolution of its board of directors spread upon the minutes of its proceedings does not express correctly the proposition which was voted by the board. The record of the minutes is only presumptive evidence of what was done. The rule was laid down in *Fletcher Cyclopedia of Corporations,* Sec. 2198, as follows:

"Where the minutes contain a record of action taken, it will be presumed, prima facie, that the record covers the entire action. This is not conclusive, however, and parol evidence may be introduced to show *what was in fact done,* and if the minutes appear on their face or are shown to be incomplete or incorrect or otherwise fail to show what actually transpired, parol evidence is admissible to supply the omission * * *." (Italics ours.)

Turnbull v. Payson, 95 U. S. 418;

Selley v. American Lubricator Co. (Ia.), 93 N. W. 590.

This was held in *Gilson Quartz Mining Co. v. Gilson,* 51 Cal. 341, where certain directors, who had been present at the meeting and who had actually acquiesced in the erroneous report thereof, were permitted to show such fact.

Another proof that corporate records, in and of themselves, are not sacred in character is found in *Lawrence v. Premier Indemnity Assurance Co.,* 180 Cal. 688, where the Court said:

"The rule forbidding the varying of the terms of a written instrument is based fundamentally upon the hypothesis that the writing or set of writings is one which the parties have agreed upon as being the final and complete expression of their understanding, that, as Professor Wigmore and others put it, there has been an integration. (Wigmore on Evidence, secs. 2401, 2425, 2439.) With respect to the agreement of October 11, 1911, no writings of this character appear in the present case. * * * *But minutes of a meeting are not a written instrument. Their function is merely*

to act as a written record of what took place at the meeting. That record may be true or it may not be, and in the absence of the element of estoppel, as where a party has acted in justifiable reliance upon the minutes, it is permitted to the corporation or to anyone else to show what actually did take place at the meeting. (*Gilson etc. Co. v. Gilson,* 51 Cal. 341; *Boggs v. Lakeport etc. Assn.,* 111 Cal. 354 [43 Pac. 1106]; 7 R. C. L. sec. 126.)" (Italics ours.)

The only exception with regard to the rule laid down in the above quotation is where there is an element of estoppel. Such an element does not exist in the present case. It is true that Walbridge knew of the provisions of the resolution and entered on his employment in reliance thereon. It is also true, however, that he was one of the principal officers, directors and stockholders of the defendant corporation. He was familiar with every subsequent act and the record shows, without dispute, that he knew of the various changes in the situation effected by subsequent events. The matters establishing his knowledge in this regard are either in the record or have been erroneously rejected by the trial court upon the ground that they are immaterial. In fact, if there were any estoppel in this case it would work against Walbridge instead of against the Company. As an officer of the Company and as one present at its meetings he cannot thereafter question the authority of other officers to act and to bind the corporation. This rule is well expressed as follows:

"A third person who deals with another who professes to act as an officer or agent for the cor-

poration is generally estopped, as against the corporation, to deny the character and authority of such officer or agent and the validity of his acts thereunder, especially where such person through his agent, an officer of the corporation, *takes part in the action which is claimed to be invalid.*" (Italics ours.)

14 A C. J. 372, Sec. 2231.

To the same effect are:

Morrison v. Mitchell (243), S. W. 555;

Miller & Co. v. Woolsey, supra (N. J.), 128 Atl. 540.

Nor are the words of the resolution a definite contract. They are merely authority to enter a contract. There has been no meeting of the minds where simply preliminary negotiations have taken place and where a more formal contract is contemplated.

Ambler v. Whipple, 87 U. S. 546;

Hardwood Package Co. v. Courtney Co., 253 Fed. 929 (C. C. A. 4c.);

Spinney v. Downing, 108 Cal. 666.

The testimony of Milton S. Dillon, secretary and treasurer of the Company, to the effect that informal meetings of the board of directors were frequently held was also wholly excluded. (R. p. 102; Assignment of Errors XXVII, R. p. 167.) He testified:

"In order to understand the situation you must realize that the company was handled by a very few individuals. In fact, it was difficult for me as treasurer to get a full board together. It was therefore my custom as treasurer and secretary not to call a meeting of directors unless it was

> necessary to have a matter passed upon by the board as a board. * * * All other matters which were not actually required by law to be passed upon by the board of directors I attended to myself. * * * The board meetings were always informal and the directors left the actual running of the company in my hands."

This testimony was vital in order to explain the failure of the minutes to show that certain steps had been taken by the Company which the Company claimed had been taken in modification of the original resolution of employment. That such informal meetings are valid was held by Mr. Justice Wilbur in *Martin v. Howe,* 190 Cal. 187, where he said:

> "The only doubt as to the authority of the president and secretary to execute the note of March 7, 1911, on behalf of the corporation arises from the fact that no record was kept of the transaction at the meeting of the board of directors. Several witnesses, however, testified there was such a meeting and that at such meeting the purchase of land and the execution of the note were authorized. This evidence was sufficient. * * *"

This is also the rule of *The Bank of the United States v. Dandridge,* 12 Wheat. 64, where it was held that a formal resolution authorizing an officer of the corporation to execute a bond was not necessary. The Supreme Court said:

> "A board may accept a contract, or approve a surety by vote, or by a tacit and implied assent. The vote or assent may be more difficult of proof, by parol evidence, than if it were reduced to writ-

ing. But surely, this is not a sufficient reason for declaring, that the vote or assent is inoperative."

To the same effect are:

Denver etc. Co. v. Arizona etc. Co., 233 U. S. 601;

Cory v. Hamilton Nat. Bank, 31 Fed. (2) 379;

Pantages Theatre Co. v. Lucas, 42 Fed. (2) 810, C. C. A. 9;

Otsego Co. v. Slosberg (Mich.), 202 N. W. 991;

Gentry Co. v. Gentry (Fla.), 106 So. 473;

McMurray v. Witherspoon Co. (Okla.), 269 Pac. 357.

It is true that in the instant case the trial court excluded not only the oral evidence of the informal resolutions but also the action taken by the officers pursuant thereto. This ruling constituted double error.

Finally, there is the flagrantly damaging action of excluding said letter of March 21, 1925, and then admitting, over the Company's objection, another letter, plaintiff's exhibit 18. (R. p. 81; Assignment of Errors I and II, R. pp. 146 and 147.) This latter letter permits Walbridge to prove his case by an asserted construction put upon the original resolution. The letter is from Mr. Dillon to Walbridge's wife, stating that his salary cannot be paid until the project "literally pans out." We believe that this term "literally pans out" helps our interpretation of the true situation. By inference, it means that only $300 will be paid and the remainder will be withheld until the venture has been put on a dividend paying basis. But whether it has this effect or not, to admit one of these letters of

interpretation and to exclude the other is, we submit, an injustice and reversible error. Furthermore, this plaintiff's exhibit 18 was not admissible at all because it was not shown to the witness Milton S. Dillon nor to his attorney during his cross-examination at the time his deposition was taken in New York. One of the grounds on which the Company objected to its admission at the trial was "* * * that it was a letter which had never been shown the writer." It was also admitted then by counsel for plaintiff that the letter had not been shown to Mr. Dillon in New York and that plaintiff had it in his possession at the time the action was brought. This failure to exhibit the instrument at the time of the deposition deprived Dillon of the opportunity of explaining it and was in violation of the Alaskan Statute. (Sec. 1502, Compiled Stats. of Alaska.) It is obvious that the purpose of introducing this letter was to impeach Dillon's testimony that $300 of Walbridge's salary was contingently withheld by showing that he had committed himself in writing contrary thereto. The admission of this letter would have no other effect than to impeach Dillon and for that reason was most damaging to the Company's case. Had it been shown to Dillon at the time of his deposition he could have explained that any "sufficient balance" in the Company's bank account would mean that the Company was on a self-sustaining basis. This would conform entirely to what he meant when he said "literally pans out."

2. Evidence going to establish that plaintiff went to Alaska during 1924 at his own expense and without salary should have been admitted.

On direct examination Walbridge testified as follows: that no one said a word to him about being discharged or *working without compensation.* (R. p. 80.)

This question of whether Walbridge agreed to work during 1924 without compensation is vital to the case. Even if he had not made a statement to the effect that no one had ever mentioned the advisability of his working that year without compensation, still it would be important. But having denied in advance that he had heard the subject mentioned, opened the door both for the purpose of impeachment and also for the purpose of establishing part of the Company's case. It was, therefore, error for the Court to make the following ruling when Walbridge was asked the following question (R. p. 85; Assignment of Errors XII, R. pp. 159 and 160):

> "Q. Isn't it a fact that at the time of the board meeting, it might have been either before the board was officially called, or during the board meeting, or just before the board meeting, at the office of the company in New York about the 6th of February, 1924, at a time Mr. Fowler was there, Mr. Dillon, Mr. Grubb, at which time it was stated that the company didn't have money enough to pay you any salary, and you had asked to go to Alaska and they stated they could not pay you any salary, and you stated it was imperative that you should go on account of your stock interest and that you had to go up there to protect your own stock interest, and that you would be willing to go up without salary?"

and the Court finally sustained an objection to said question on the ground that it was not proper cross-examination. Since Walbridge had just concluded his testimony to the effect that he had heard nothing of an arrangement concerning working without compensation, the ground selected by the Court is difficult to understand. The Court also stated that the matter was something for the case in chief of the Company. However, the three persons mentioned in said question as having been present at the meeting were Messrs. Fowler, Dillon and Grubb. Each of them stated in his deposition that the meeting occurred and the discussion was had as stated in the above question, and no objection was made to their testimony. (R. pp. 90 to 106.) Why should the Company have been denied the right to question Walbridge on cross-examination on this important point, Walbridge having already denied that he knew anything about it?

3. Most of the testimony concerning financial statements and budgets, all of which threw a light upon the salary of Walbridge, was erroneously excluded.

For some reason the trial court was prejudicially hostile to testimony concerning estimated budgets and related matters. As all of these were either prepared by Walbridge himself or were referred by the respective witnesses to him from time to time, they were the clearest evidence of what his compensation was, and particularly what he himself considered it to be.

The first of these is a conversation which took place on March 27th, when Dorer, accountant, was fixing up the books of the Company with Walbridge. He was

instructed by Walbridge to enter the sum of $18,000 as a liability for his, Walbridge's, salary. Dillon objected, stating emphatically that his salary was contingent until the Company was on a dividend paying basis, and Dillon instructed Dorer to enter this item as a contingent liability, whereupon Walbridge stood looking down without saying a word and finally walked out. (R. pp. 89-90; Assignment of Errors XVII and XVIII, R. pp. 162 and 163.)

Another such case is, on cross-examination Walbridge was asked with regard to a meeting held in the office of the Company on August 8, 1927, when Crowdy, the bookkeeper and Dawson, the engineer, were making up a budget consisting of an estimate of the year's running expenses. At that meeting Walbridge was asked whether the figure of $7200 for himself and for Hirsh, or $7200 for each of them, was a proper one and Walbridge stated that the proper figure for himself was $3600 a year and that he did not get the other $3600. The Court excluded this testimony. (R. p. 88; Assignment of Errors XVI, R. p. 162.)

The first of these conversations is confirmed by the depositions of Milton S. Dillon (R. p. 100) and Arthur B. Dorer (R. p. 104) and the second by the depositions of E. H. Dawson (R. p. 113) and James K. Crowdy. (R. p. 118.) The testimony of all of these witnesses was excluded by the trial court upon the same ground as the similar testimony of Walbridge on cross-examination.

An attempt was made by the Company to bring out through the witness Ralph T. Hirsh certain matters

with regard to Walbridge's compensation. Hirsh was a mining engineer who had been employed by Walbridge to accompany the latter to Alaska on the first trip to the Territory and he remained with the Company at all times thereafter. The following discussion arose:

> "Q. How did that conversation come up?
>
> A. We were discussing my salary and the upshot of the whole matter was that Mr. Walbridge persuaded me to take the same salary as you have just mentioned, that is, $300 a month cash and $300 a month contingent on the company getting on a paying basis and paying dividends, because he told me that he was getting the same salary."
>
> (R. p. 115; Assignment of Errors XL, R. p. 176.)

The Court excluded this entire line of testimony. Certainly, it was something which should have been submitted to the jury. They could then draw any conclusion therefrom which they desired and they could either give it great weight or little, but it was, we submit, a glaring error to reject it.

Certain detailed budgets and estimates of expense, most of them prepared by Walbridge himself, were offered in evidence for the purpose of showing his own ideas with regard to his compensation, and for some reason all were excluded. (R. pp. 149 to 157 inclusive.)

4. Oral testimony of conversations and acts prior and subsequent to the letter of April 13, 1925, was erroneously excluded on the theory that it was merged in the letter.

Plaintiff's Exhibit 2 is as follows (R. p. 81):

"New York-Alaska Gold Dredging Co.
New York, N. Y.
April 13th, 1925.

Lester B. Walbridge,
180 Argyle Road,
Brooklyn, N. Y.

Dear Sir:

According to our understanding, beginning May 1st, 1925, you are to receive $300 per month, which is to apply against your salary of $600 per month. The balance to accrue to your credit on the books of the company.

New York-Alaska Gold Dredging Co.,
By M. S. Dillon,
Sect'y & Treas."

Throughout the case Walbridge gives this letter a surprising amount of weight. In offering it in evidence he referred to it as the following *"agreement,"* yet it was nothing more than an ordinary letter signed by Mr. Dillon on behalf of the Company and having on it no evidence of either the signature or the approval of Walbridge. On cross-examination (R. p. 87) the Company asked Walbridge concerning the meeting held on February 25, 1925, at the office of the Company where the salary of Walbridge was discussed, in which it was stated that the additional $300 was contingent. The attorney for Walbridge objected to this question on the remarkable ground that it was immaterial because it had been *merged* in the writing of April 13, 1925,

and any conversation prior thereto was wholly inadmissible. The Court sustained the objection. This is the subject of assignment of errors XIII. This unilateral letter also had even less dignity than the formal resolution of the board of directors and there is no reason why it should be selected as having been the understanding in which all the other negotiations were merged. Such a merger arises, as we have already pointed out, only where the intent of the parties is evident by its complete and formal character. The meeting of February 25, 1925, concerning which the question was asked is merely one of the many instances evidencing relationship between the parties which the Company sought to show. There was no connection between it and said letter of April 13, 1925.

The trial court was at least consistent in this regard because it likewise, on the same ground, on the strength of this letter ruled out of testimony with regard to a meeting of the board of April 13, 1925. (R. p. 87.)

In *Page on Contracts,* Sec. 2144, the usual rule with regard to merger is laid down:

> "In an action on an *unambiguous* written contract, which is *complete* in itself, and the validity of which is conceded, the parties are not permitted to show that their prior or contemporaneous oral agreements were not all reduced to writing." (Italics ours.)

One of the cases cited in support of this is *Remsbery v. Hackney Mfg. Co.,* 174 Cal. 799, where there is a dictum, showing that the contract must be clearly

arrived at. But the textwriter goes on to show that this rule has its application only where the contract *is* complete, saying:

> "Sec. 2151. *Incomplete Contracts.* The parol evidence rule has but a limited application to contracts and memoranda which show upon their face that they are *incomplete* and which are not required by law to be in writing or to be proved by writing. In contracts of this class, extrinsic evidence is admissible to show the terms of the contract which are not set forth in writing, as far as they are consistent with terms which are in writing." (Italics ours.)
>
> *Shubert v. Rosenberger,* 8 Circ., 204 Fed. 934.

On the same mistaken theory the trial court ruled out the testimony of Oswald Fowler. (R. pp. 108, 109 and 110; Assignment of Errors, XXXIII, XXXIV and XXXV, R. pp. 171 and 172.)

The same theory pervades the instructions. The Court gave the following instruction (R. p. 202):

> "At that time the plaintiff and defendant entered into a *second written contract,* and the dispute is as to its terms and construction." (Italics ours.)

Under objection E of Assignment of Errors XXX (R. p. 194) the Company objected that "said letter of April 13, 1925, does not embody the agreement existing between the parties but is merely a memorandum referring to a prior oral contract between the parties."

II.

THE INSTRUCTIONS.

1. The instruction with regard to the burden of proof.

It was error for the trial court to instruct that the burden of proof was upon Walbridge to prove the existence of a contract but upon the Company to prove no services were to be rendered and no money was to be paid during a certain period under said contract. There is no reason why the ordinary burden of proof which is on the plaintiff should here shift. Because a certain circumstance happened to be one which is rather the reverse of the expected in a business deal, does not mean that its existence changes said burden of proof. If this were the case a trial court would be forced continually to decide whether the circumstances are so unusual as brought about said shift. (Assignment of Errors, R. p. 189.)

2. The trial court was in error in instructing that the second $300 per month should accrue absolutely upon the books of the Company in Walbridge's favor, regardless of the financial condition of the Company.

In construing that written instrument (the Court refers to said letter of April 13, 1925)

> "I instruct you that the words 'accrue to your credit on the books of the company' as therein used and as applied to the sum of $300.00 per month not to be paid in cash by defendant to plaintiff meant that said $300.00 per month should be entered on the defendant's books as a credit to plaintiff and should thereupon become a fixed obligation of the defendant which plaintiff had an immediate right to enforce. *However, taken in connection with the provision of the letter with*

regard to the payment of $300.00 per month cash, there is an included right given to the defendant to withhold until plaintiff made demand therefor the payment of the $300.00 per month which was to accrue to the plaintiff." (R. p. 195.)

This is the subject of the Company's Assignment of Error LXI A. It is clear from that portion of the instruction which we have italicized that the trial court bound the jury to find that even after the execution of said letter of April 13, 1925, the Company was absolutely obligated to pay to Walbridge, upon demand, the second $300 accruing each month. The testimony is uncontradicted that this payment was to be regarded as a contingent liability, payment was to be made only when the Company was in a good financial condition and was paying dividends. That condition never arose.

Such an instruction was error. The question of when said second $300 was accrued each month, if it accrued at all, was for the jury.

3. In plaintiff's instruction No. 4 the trial court made erroneous assumptions of law with regard to the resolution of March 21, 1922, and the letter of April 13, 1925.

In said instruction No. 4 are the following words: "That resolution expressed and fixed the terms of employment between the parties." (R. p. 198.) As pointed out in assignment of errors LXII A, the resolution was not a contract but a mere authority and an offer on the part of the Company to contract and, therefore, did not, in and of itself, fix the terms of employment. There is also the language in said instruction giving

the same erroneous effect to the letter of April 13, 1925. This must be taken in connection with our Assignment of Error LXVII (R. p. 202), where objection is made to that portion of instruction No. 2, which refers to said letter of April 13, 1925, as being a second written contract. Said letter was, of course, only a memorandum concerning a prior oral contract.

Instruction No. 4 is also objectionable in that in it it states that in order to terminate the employment of plaintiff under the resolution of March 21, 1922, affirmative action was necessary by the defendant or its officers. No affirmative action was necessary. The burden of proving this was always on the plaintiff. Furthermore, the instruction fails to take into consideration that Walbridge himself might have terminated the contract, either by resignation or by tacit agreement. (Assignment of Errors LXII B.)

4. **Defendant's proposed instruction No. 1 concerning the legal effect of the resolution of March 21, 1922, should have been given.**

Defendant's proposed instruction No. 1 (Assignment of Errors LV, R. p. 181), first quotes said resolution of March 21, 1922, then it states:

> "You are instructed that said resolution does not constitute a binding contract between the parties that can be altered only by a resolution of the Board of Directors by a duly and regularly passed resolution, but said resolution might be altered by a subsequent oral agreement between said plaintiff and the Directors of said corporation or some of them."

We have already established in the first part of this brief all of the legal propositions just above stated.

It is unnecessary to repeat the authorities which establish the very fair and unquestioned rule of law that subsequent oral agreement with officers or with the directors may alter the terms of a resolution. As a matter of fact this was also hereinbefore pointed out by the holding of this Court in the prior opinion. The second part of the proposed instruction is as follows:

> "The defendant has introduced evidence which it claims shows that the plaintiff Walbridge and the Directors of said corporation, or some of them, agreed orally that the plaintiff should not go to Alaska as General Manager of the mining business of said defendant corporation for the period between March 1, 1923 and March 1, 1924, and further agreed that the plaintiff Walbridge should not be entitled to any salary for said period. You are instructed that you should consider all of the evidence on the above mentioned subject and if the defendant Walbridge has failed to prove to you by a preponderance of the testimony that said resolution was in full force and effect during the period from March 1, 1923, to March 1, 1924, and that he performed the duties of Manager for said corporation during said period under said resolution, you should not find that he is entitled to any salary for said period." (R. p. 182.)

This part of the instruction was as well established as the first part. If the evidence introduced by the defendant with regard to Walbridge agreeing to go to Alaska or receive any compensation during the second

year of the employment was sufficiently convincing for the jury to believe it and if Walbridge failed to be convinced enough with regard to the said agreement remaining in force during that year, the jury was bound to find that no salary was to be paid during said period.

5. The exclusion of defendant's proposed instruction No. 3 relating to services rendered in 1924 was error.

The instructions contained certain obvious references to the contentions of the two parties. It then quoted said resolution of March 21, 1922, and following are these words:

> "You are instructed that if the plaintiff Walbridge has shown you by a preponderance of the evidence that such resolution was in full force and effect during the above mentioned period and that he performed such services thereunder, then you should find that he is entitled to a salary of $600 per month for said period, but if he has not shown by a preponderance of the evidence that said resolution was in full force and effect during said period and that he performed such services thereunder, you should find that he is not entitled to any salary for services during said period." (R. p. 186.)

In the above quotation the jury is instructed in the clearest language possible. It is told that, if it believes the testimony of Walbridge, $600 per month should be paid during the entire third year of the employment. If it believes the testimony of defendant, no compensable services were performed during said year and no salary may be allowed during said period. (Assignment of Errors LXVII, R. p. 185.)

We respectfully submit that from the foregoing we have shown that by its erroneous exclusions of evidence and by its instructions the trial court has accomplished something which is tantamount to the action of the Court upon the first trial of this case—to all practical purposes it has rendered an instructed verdict in favor of Walbridge and against the Company. For that reason the matter must be sent back for a further trial at which the Company may for the first time properly present its full case to the jury.

Dated, San Francisco, California,
February 28, 1934.

Respectfully submitted,
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